of the State's witnesses; it explained why Williams' girlfriend, Michelle, initially lied (out of fear of Williams), but then told the truth (because after hearing of the assault on Norma, she was afraid Williams would try to kill her next). "'Evidence which tests, sustains, or impeaches the credibility or character of a witness is generally admissible,' even if it refers to a defendant's prior bad acts."

Likewise, evidence of the murder was relevant to show Williams' motive in shooting Norma. "Although motive is not an element of a crime, a trial court may admit evidence of a defendant's other misconduct if the misconduct furnished or supplied the motive for the charged crime."

Because the bulk of the evidence as to each case would have been admissible at trial of the other case, the cases were properly consolidated.

RULE 404(B): The Supreme Court analyzed each of the 4 steps in the Rule 404(b) analysis: (1) Proper purpose under Rule 404(b); (2) Relevancy requirement of Rule 402; (3) Rule 403 balancing, (4) Rule 105/limiting instruction.

As to (1), the State introduced evidence that Williams had previously burned Rita's car, slashed her tires, and shot at her apartment. The prior acts of aggression toward Rita's property showed his animosity toward her, and were therefore admitted for the proper purpose of showing his motive and intent.

As to (2), the Supremes considered relevance as though it is the same inquiry as the sufficiency of the evidence. "We conclude that the evidence was sufficient. Evidence whose relevancy depends on the fulfillment of a condition of fact is admissible when a jury could reasonably believe from the evidence that the condition was fulfilled." Because the jury could reasonably have concluded that Williams committed the prior acts, they were relevant.

44. *State v. Woody,* 173 Ariz. 561 (App. 1992): In late December, 1989, with a BAC above .2, Woody drove the wrong way down Orange Grove in Tucson over 60 mph and struck the victim head-on, killing him. He was charged with 2nd degree murder. Before trial, the State sought to admit evidence of Woody's 9 prior arrests for DUI to show his reckless indifference to human life. The trial court (Judge Hantman), ruled that one previous conviction was admissible, because it was closer in time and the facts of that incident were relevant in the instant case. The prior incident was from 4 years previous (December 1985), and involved Woody driving up to 60 mph through a residential neighborhood while being chased by police (with lights and sirens).

HELD: Analyzing the proper purpose of proving Woody's mental state, the court of appeals noted that "[e]vidence of a prior crime, act, or wrong cannot be introduced to prove a defendant's mental state unless it is similar to the act for which the

defendant is on trial." The crime need not be identical, but it must "permit jurors to infer either that the defendant intended the act in question or had knowledge of its consequences." Here, the facts of the prior "were sufficiently similar for the jurors reasonably to conclude that as a result of it, appellant was made aware of the risks he posed to others in driving while under the influence."

45. *State v. Yonkman*, 233 Ariz. 369 (App. 2013)(*Yonkman III*): Yonkman molested his wife's daughter. At trial, the court permitted the State to present testimony of two of the victim's friends who had been molested by him at sleepovers, but the trial court refused to allow Yonkman to present evidence he had been acquitted of charges stemming from these allegations.

In *Yonkman I,* the Court of Appeals reversed the conviction based on a purported violation of *Edwards*. In *Yonkman II*, the AZ Supreme Court vacated *Yonkman I*, finding Yonkman re-initiated contact with police, but remanded to the Court of Appeals for determination of, *inter alia*, whether the trial court erred in admitting prior bad acts for which Yonkman had been acquitted and/or by precluding evidence of acquittal.

HELD: The trial court did not abuse its discretion in admitting other-act evidence for which Yonkman had been acquitted. Such evidence may be admitted if the trial court finds by clear and convincing evidence that the defendant committed the act. *State v. Little,* 87 Ariz. 295 (1960), precluded acquitted acts, but the court did not find it controlling. First, because that decision does not apply to the subsequently-adopted "clear and convincing" standard now applicable to other-act evidence. Second, because the Double Jeopardy and Due Process clauses do not categorically bar acquitted- conduct evidence when the evidence is governed by a lesser standard than proof beyond a reasonable doubt. *Dowling v. United States,* 493 U.S. 342 (1990). The court noted that the AZ Supreme Court has, in *dicta*, mentioned that *Dowling* reopened the question of admitting acquitted conduct. *State v. Terrazas,* 189 Ariz. 580 (1997). The court also noted that a majority of other states allow evidence of acquitted conduct.

The court separately addressed whether Yonkman should have been able to rebut such evidence with evidence of the acquittal itself. The court noted that the other division of the Court of Appeals held in *State v. Davis,* 127 Ariz. 285 (App. 1980), that "the better rule allows proof of an acquittal to weaken and rebut the prosecution's evidence of the other crime." The court did not disregard *Davis*, but read it to require a case-by-case analysis by the trial court. The court rejected the State's argument that acquittal evidence should never be admitted. Rather, the better rule is that such evidence be admitted if the jury has likely learned the defendant was tried for the prior act and may speculate about the defendant's guilt in that trial.

The court discussed that this would often be the case: "*Davis* reflects the reality that when evidence of acquitted conduct is presented, the fact of the acquittal often becomes admissible under these rules." The court noted that the trial court attempted to prevent the jury from learning about the prior trial, but the jury still learned about previous reports to police, statements taken by police, transcripts, testimony, etc. It was thus an abuse of discretion to preclude evidence of the acquittals. However, the error was harmless because Yonkman had confessed, thus corroborating the victim's claims.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE REGARDING APPELLANT'S PRESENCE AT FAMOUS SAMS THE NIGHT BEFORE THE SHOOTINGS.

Appellant asserts that the trial court committed reversible error in admitting evidence that he tried to enter Famous Sams the night before the shootings with a gun, was thrown out, and beaten up. The trial court acted well within its considerable discretion in admitting this evidence because it was relevant and extremely probative to prove motive, identity, and intent.

A. FACTUAL BACKGROUND.

The State filed a pretrial motion *in limine*, noticing its intent to present at trial, evidence that the night prior to the shootings giving rise to the charges, Appellant was in possession of a Ruger handgun, became involved in an altercation at Famous Sams, left a bloody handprint on the wall outside Famous Sams, and threatened to return and seek revenge. (R.O.A., Item 11 at 1–4.) The State asserted that this evidence was "intrinsic" to the crimes charged. (*Id.* at 5–7.) The State asserted that the evidence was also admissible under Rule 404(b) of the Arizona Rules of Evidence to prove motive and intent. (*Id.* at 7–9.) The trial court found that the evidence was intrinsic, and ruled it admissible. (R.T. 11/30/11, at 51.)

B. APPLICABLE LAW.

In *State v. Ferrero*, 229 Ariz. 239, 243, ¶ 20, & n.4, 274 P.3d 509, 513 (2012), the Arizona Supreme Court significantly narrowed the scope of "intrinsic" evidence, effectively overruling, or abrogating, a slew of prior decisions of both that and this Court. The supreme court limited the scope of intrinsic evidence to evidence that: "(1) directly proves the charged act, or (2) is performed contemporaneously with and directly facilitates commission of the charged act." *Id.*, ¶ 20. However the supreme court made clear that much of what was previously considered "intrinsic" evidence would, nonetheless, be admissible under Rule 404(b) of the Arizona Rules of Evidence: "Our narrow definition of intrinsic evidence will not unduly preclude relevant evidence of a defendant's other acts. Non-intrinsic evidence will often be admissible for non-propensity purposes under Rule 404(b)." *Id.* at 514, ¶ 23, 274 P.3d at 244. In fact, the supreme court quoted with approval the following:

> [I]t is unlikely that our holding will exclude much, if any, evidence that is currently admissible as background or "completes the story" evidence under the inextricably intertwined test. We reiterate that the purpose of Rule 404(b) is simply to keep from the jury evidence that the defendant is prone to commit crimes or is otherwise a bad person, implying that the jury needn't worry over much about the strength of the government's evidence. No other use of prior crimes or other bad acts is forbidden by the rule, and one proper use of such evidence is the need to avoid confusing the jury. Thus, most, if not all, other crimes evidence currently admitted outside the framework of Rule 404(b) as "background" evidence will remain admissible under the approach we adopt today. The only difference is that the proponent

> will have to provide notice of his intention to use the evidence, and identify the specific, non-propensity purpose for which he seeks to introduce it (*i.e.*, allowing the jury to hear the full story of the crime). Additionally, the trial court will be required to give a limiting instruction upon request.

Id. (quoting *United States v. Green*, 617 F.3d 233, 249 (3rd Cir. 2010)).[1]

Evidence is admissible under Rule 404(b) for *any* relevant purpose other than proving "the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b); *see also State v. Jeffers*, 135 Ariz. 404, 417, 661 P.2d 1105, 1118 (1983) ("The list of 'other purposes' in rule 404(b), for which other crime may be shown, is not exclusive; if evidence is relevant for any purpose other than that of showing a defendant's criminal propensities, it is admissible. . . ."). Also, Rule 404(b) is "a rule of inclusion," and precludes the admission of other acts "only when [they are] offered for the sole purpose of proving character." *State v. Terrazas*, 189 Ariz. 580, 588, 944 P.2d 1194, 1202 (1997); *see also Huddleston v. United States*, 485 U.S. 681, 687 (1988) (noting that Federal Rule of Evidence 404(b) does not "flatly prohibit the introduction" of certain evidence, but instead, "protects against the introduction of extrinsic act evidence when that evidence is offered solely to prove character").

Pursuant to Rule 404(b):

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[1] The same is *not* true regarding Rule 404(c) of the Arizona Rules of Evidence because such evidence, is, in fact, "offered to prove the defendant's propensity to commit the charged act," and the trial court must screen the evidence as required by Rule 404(c). *See Ferrero*, 229 Ariz. at 245, ¶ 28, 274 P.3d at 515.

> [E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, *such as* proof of *motive*, opportunity, *intent*, preparation, plan, knowledge, *identity*, or absence of mistake or accident.

(Emphasis added.) To be admissible under Rule 404(b): (1) the prior act evidence must be relevant and admissible for a proper purpose; (2) the prior act must be established by clear and convincing evidence; (3) the prejudicial value of the prior act must not substantially outweigh its probative value; and (4) the trial court must give a limiting instruction concerning the use of the evidence if requested by the defendant. *State v. Nordstrom*, 200 Ariz. 229, 248, ¶ 54, 25 P.3d 717, 736 (2001); *State v. Mills*, 196 Ariz. 269, 274–75, ¶ 24, 995 P.2d 705, 710–11 (App. 1999).

C. ANALYSIS.

Although the trial court ruled the evidence admissible as "intrinsic" evidence, it does not appear to meet the narrowed standard set forth in *Ferrero*. However, the evidence was clearly admissible pursuant to Rule 404(b) to prove Appellant's motive to fire shots into Famous Sams, his intent in doing so, and to prove the identity of the shooter. *See Ferrero*, 229 Ariz. at 514, ¶ 23, 274 P.2d at 244; *Andriano*, 215 Ariz. at 503, ¶ 23, 161 P.3d at 546.

Appellant's animosity toward Cooper, and Famous Sams in general, was extremely probative to establishing his motive to fire seven shots into the front door of Famous Sams. The night prior to the shootings, Appellant was severely

beaten by Cooper, the manager at Famous Sams, and humiliated in front of his girlfriend. (R.T. 6/5/12, at 36, 51–52, 117, 121, 188–89.) Appellant was so upset and humiliated that he began yelling and making threats, stating, "I'll be back. You're all dead." (*Id.* at 52; R.T. 6/4/12, at 91–92; R.T. 6/6/12, at 66; R.T. 6/11/12, at 108–10.) Appellant made his motive crystal clear. Motive is clearly a "proper purpose" for admitting other act evidence. *See, e.g., State v. Hardy*, 230 Ariz. 281, 289, ¶ 38, 283 P.3d 12, 20 (2012) ("Evidence of prior argument with or violence toward a victim is [ ] admissible to show motive or intent"); *State v. Johnson*, 212 Ariz. 425, 430, ¶ 12, 133 P.3d 735, 740 (2006) (evidence of defendant's gang involvement admissible to prove motive to kill victim to eliminate her as a witness and to further the criminal objections of the gang); *State v. Gulbrandson*, 184 Ariz. 46, 61, 906 P.2d 579, 594 (1995) (evidence of prior assault on victim admissible to prove "motive and intent"); *State v. Mills*, 196 Ariz. 269, 275, ¶ 26, 995 P.2d 705, 711 (App. 1999) (evidence that defendant had previously cut victim's brake line admissible to prove motive for murder).

Similarly, the evidence was admissible to prove intent. *See Hardy*, 230 Ariz. at 289, ¶ 38, 283 P.3d at 20 (evidence of prior argument or violence admissible to prove intent); *Gulbrandson*, 184 Ariz. at 61, 906 P.2d at 594 (evidence of previous assault "shows motive and intent"); *Mills*, 196 Ariz. at 275, ¶ 26, 995 P.2d at 711

(evidence that defendant had previously cut the victim's break line admissible to prove intent to kill victim).

The evidence was also admissible to prove the identity of the shooter. *See Johnson*, 212 Ariz. at 430, ¶ 12, 133 P.3d at 740 (evidence of defendant's gang involvement admissible to help prove identity of defendant in committing murder and other crimes); *Nordstrom*, 200 Ariz. at 249–50, ¶ 65, 25 P.3d at 737–38 (evidence that defendant and another person were in possession of weapons of the type used in commission of murders hours earlier admissible to prove identity).

Appellant focuses upon "evidence of him trying to enter the Famous Sam's the night before the shootings with a gun," claiming (erroneously) that it was admitted to show that "he must have been the man with the gun the following night." (O.B. at 18.) Not so. Evidence regarding the gun was clearly admissible to prove identity by tying Appellant to the gun used the following night to commit the shootings. Robert Ulich testified that the gun Appellant possessed on Thursday night was a "Ruger" semiautomatic handgun (R.T. 6/11/12, at 97–100)—the same type of gun Appellant used in the shootings the following night, *and* the same type of gun Appellant possessed a year later.[2] Thus, separate and apart from proving motive and intent, evidence that Appellant possessed the same type of gun used in

[2] At trial, Appellant claimed that the gun he possessed on Thursday January 26, 2006, was not the same gun he possessed when arrested on January 25, 2007, which was shown to be the same gun used in the January 27, 2006 shootings. (R.T. 6/28/12, at 48.)

the shootings was relevant and extremely probative to prove his identity as the shooter. *See Nordstrom*, 200 Ariz. at 249–50, 25 P.3d at 737–38 (evidence that defendant and another person were "in possession of weapons of the same type" used hours later in committing murders relevant and admissible to prove identity and opportunity); *State v. Dickens*, 187 Ariz. 1, 18–19, 926 P.2d 468, 485–86 (1996) (evidence that defendant stole a gun from a co-worker in California admissible to prove that Appellant, and not his accomplice, procured the gun used to commit the murders).

The State did not offer evidence of the Thursday night incident to prove that Appellant has a character for getting beat up, or that he acted in conformity with that character in committing the crimes the following night. Nor was the evidence admitted to show that Appellant had a propensity to attempt to sneak guns into bars, or to show that he was a bad person. As discussed above, the evidence was admissible to prove motive, intent, and to assist in identifying Appellant as the person who fired the shots into Famous Sams the following night.

Because the trial court admitted the evidence as "intrinsic" evidence it did not make a specific finding that the jurors could find by "clear and convincing evidence" that Appellant was the same person that got beat up at Famous Sams the night before the shootings. *See Nordstrom*, 200 Ariz. at 248, ¶ 57, 25 P.3d at 736; *State v. Terrazas*, 189 Ariz. 580, 582, 944 P.2d 1194, 1196 (1997). However, the

State proved it to an absolute certainty, and Appellant conceded it at trial. (R.T. 6/28/12, at 47, 67–68, 91.) Margaret Finn, Cooper Redmond, Esmeralda Mesa (Appellant's girlfriend), Robert Ulich, and Lucy Munoz *all* testified that Appellant was the person Cooper beat up at Famous Sams the night before the shootings. (R.T. 6/4/12, at 83–84; R.T. 6/5/12, at 41–42, 177; R.T. 6/11/12, at 98–99; R.T. 6/19/12, at 27–29.) And, DNA analysis established that he left the bloody handprint on the exterior wall at Famous Sams after he was beat up by Cooper. (R.T. 6/12/12, at 52–53, 56; R.T. 6/14/12, at 155, 159.) Thus, the evidence clearly "satisfied the *Terrazas* standard." *Nordstrom*, 200 Ariz. at 248, ¶ 57, 25 P.3d at 736.

The trial court did not make an explicit Rule 403 ruling because Appellant never raised a Rule 403 objection. Where, as in the present case, a party does not raise a Rule 403 objection, the trial court is not obligated to make a Rule 403 ruling. *See State v. Cannon*, 148 Ariz. 72, 76, 713 P.2d 273, 277 (1985); *State v. Salman*, 182 Ariz. 359, 365, 897 P.2d 661, 667 (App. 1994). In such a situation, any Rule 403 objection has been "waived" and is not subject to appellate review. *State v. Montano*, 204 Ariz. 413, 425, ¶ 58, 426, ¶ 63, 65 P.3d 61, 73, 74 (2003); *State v. Gonzales*, 181 Ariz. 502, 511, 892 P.2d 838, 847 (1995); *see also In re Jaramillo*, 217 Ariz. 460, 465, ¶ 18, 176 P.3d 28, 33 (App. 2008) (defendant waived trial court's failure to make express Rule 403 findings by failing to request

such findings in trial court). Moreover, the trial court is presumed to know and follow the rules of evidence in making its evidentiary rulings. *State v. Warner*, 159 Ariz. 46, 52, 764 P.2d 1105, 1111 (1988); *see also State v. Ramirez*, 178 Ariz. 116, 128, 871 P.2d 237, 249 (1994) ("[T]he trial court is presumed to know and follow the law"); *State v. Williams*, 220 Ariz. 331, 334, ¶ 9, 206 P.3d 780, 783 (App. 2008) ("Trial judges are presumed to know the law and to apply it in making their decision") (quoting *State v. Trostle*, 191 Ariz. 4, 22, 951 P.2d 869, 887 (1997)). And, the danger of "unfair" prejudice was virtually non-existent because it was neither a "crime" (as far as the jurors knew) nor a "wrong" for Appellant to possess a gun or get beat up. The *only* way the evidence could "prejudice" Appellant was to show that he had a strong motive to seek revenge against Cooper and Famous Sams, and to tie him and his gun to the shootings. This was, therefore, "prejudicial" "in the sense that all good relevant evidence is." *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993).

Finally, the trial court gave the following limiting instruction:

> Evidence of other acts has been presented. You may consider these acts only if you find that the State has proved by clear and convincing evidence that the defendant committed these acts. You may only consider these acts to establish the defendant's motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.
>
> You must not consider these acts to determine the defendant's character or character trait, or to determine that the defendant acted in

> conformity with the defendant's character or character trait and therefore committed the charged offense.

(R.T. 6/27/12, at 140.) The jurors are presumed to have followed this limiting instruction. *See State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006); *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996).

The trial court acted well within "its considerable discretion" in admitting evidence regarding Appellant's presence at Famous Sams the night prior to the shootings. *Alatorre*, 191 Ariz. at 211, ¶ 7, 953 P.2d at 1264. The trial court did not abuse its discretion in admitting the evidence.

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THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF THE ROBBERY OF TIFFANY S. TO REBUT APPELLANT'S NOTICED DEFENSES OF LACK OF INTENT, ACCIDENT, AND MERE PRESENCE, AND TO PROVE IDENTITY.

Appellant asserts that the trial court abused its discretion in admitting evidence of the robbery of Tiffany S.—committed by Appellant and Lopez less than 24 hours prior to the murder of Kyleigh. Appellant makes a two-pronged attack, claiming: (1) the robbery was committed by Lopez, not Appellant; and (2) "the evidence was not admitted for a proper purpose." (O.B. at 28.) Appellant is incorrect on both counts. The State presented clear and convincing evidence that Appellant was Lopez' accomplice in the robbery of Tiffany, and the evidence was clearly admissible to rebut Appellant's noticed defenses of lack of intent, accident, and mere presence, as well as to prove identity.

A. APPLICABLE LAW.

All relevant evidence is admissible unless it is specifically precluded by rule or by statute. Rule 402, Ariz. R. Evid.; *State v. Rivera*, 152 Ariz. 507, 517–18, 733 P.2d 1030, 1100–01 (1987); *State v. Fernane*, 185 Ariz. 222, 225, 917 P.2d. 1314, 1317 (App.1995.) Evidence is relevant (has probative value) if it has *any* tendency to make the existence of *any* fact that is of consequence to the determination of the trial more or less probable than it would be without evidence. Ariz. R. Evid. 401; *State v. Runningeagle*, 176 Ariz. 40, 57, 821 P.2d 731, 748 (1991). Evidence that is

admissible for any relevant purpose should be admitted, even if it is inadmissible for *other* purposes. *Unites States v. Abel*, 469 U.S. 45, 56 (1984) ("[T]here is no rule of evidence which provides that testimony admissible for one purpose is inadmissible for another purpose is thereby rendered inadmissible; quite contrary is the case."); *see also State v. Cook*, 170 Ariz. 40, 57, 821 P.2d 731, 748 (if proffered evidence can "reasonably be interpreted" as relevant for a proper purpose the trial court does not abuse its discretion in admitting the evidence).

Evidence is admissible under Rule 404(b) for *any* relevant purpose *other than* proving "the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b); *see also State v. Jeffers*, 135 Ariz. 404, 417, 661 P.2d 1105, 1118 (1993) ("The list of 'other purposes' in rule 404(b), for which other crime may be shown, is not exclusive; if evidence is relevant for any purpose other than that of showing a defendant's criminal propensities, it is admissible. . . ."). Also, Rule 404(b) is a "rule of inclusion," and precludes the admission of other acts "only when [they are] offered for the sole purpose of proving character." *State v. Terrazas*, 189 Ariz. 580, 588, 944 P.2d 1194, 1202 (1997); *see also Huddleson v. United States*, 485 U.S. 681, 687 (1988) (noting that Federal Rule of Evidence 404(b) does not "flatly prohibit the introduction" of certain evidence, but instead, "protects against the introduction of extrinsic act evidence when that evidence is offered solely to prove character").

Pursuant to Rule 404(b):

> [E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, *such as* proof of *motive*, opportunity, *intent*, preparation, plan, knowledge, *identity*, or *absence of mistake or accident*.

(Emphasis added.) To be admissible under Rule 404(b): (1) the prior act evidence must be relevant and admissible for a proper purpose; (2) the prior act must be established by clear and convincing evidence; (3) the prejudicial value of the prior act must not substantially outweigh its probative value; and (4) the trial court must give a limiting instruction concerning the use of the evidence, if requested by the defendant. *State v. Nordstrom*, 200 Ariz. 229, 248, ¶ 54, 25 P.3d 717, 736 (2001); *State v. Mills*, 196 Ariz. 269, 274–75, ¶ 24, 995 P.2d 705, 710–11 (App. 1999).

B. ANALYSIS.

1. ***Clear and convincing evidence of prior act.***

Though he failed to raise the issue in the trial court, Appellant now asserts that the State failed to present sufficient evidence to prove by clear and convincing evidence that he was a principal or accomplice to the robbery of Tiffany S. (O.B. at 26–28.) This claim is frivolous.

Appellant was clearly an accomplice—if not a principal—to the robbery of Tiffany. He was driving the car and drove up to Tiffany to allow Lopez to "snatch" her purse, then Appellant "accelerated" away with their ill-gotten gain. (R.T.

5/4/12, at 8–10.) Tiffany (like Kyleigh) was "dragged a little bit" before she fell to the roadway as Appellant made good their escape. (*Id.* at 10.) And, Lopez made clear to Detective Magazzeni that Appellant "was involved" in the robbery of Tiffany. (*Id.* at 18.) Moreover, Appellant accompanied Lopez when he later sold Tiffany's stolen cell phone at 44th Street and Indian School. (*Id.* at 11.) Furthermore, at trial, Tiffany testified that the driver (Appellant) "did a U-turn, turned around, and *drove up on the sidewalk*" to permit his accomplice (Lopez) to grab her purse. (R.T. 10/10/12, at 12, emphasis added.)

Thus, the evidence establishing Appellant's complicity—as either a principal or an accomplice—to the robbery of Tiffany is simply overwhelming. It certainly meets the "clear and convincing evidence" standard.

2. ***Proper purposes.***

Contrary to Appellant's assertion, the other act evidence was admissible for a myriad of purposes. Appellant expressly noticed the defenses of "Mere Presence," "Accident," "Lack of Specific Intent," "No Criminal Intent," and "Mistaken Identification." (R.O.A., Item 25.) At the hearing on the admissibility of the prior act evidence, the prosecutor pointed out that the evidence was being offered to rebut Appellant's noticed defenses. (R.T. 5/4/12, at 20.) Notably, with the possible exception of mistaken identification, Appellant did *not* withdraw *any* of his noticed defenses. Thus, at the time of trial, the defenses of mere presence,

accident, and lack of intent were at issue.[1] Arguably, identification was also at issue, given that Appellant was holding his cards close to the vest.

Where, as in the present case, a defendant raises the defenses of accident (or mere presence), evidence of other acts is admissible to rebut the defense and prove that the defendant's actions were intentional. *See State v. Lee*, 189 Ariz. 590, 599, 944 P.2d 1204, 1213 (1997); *State v. DePiano*, 187 Ariz. 41, 46, 926 P.2d 508, 513 (App. 1995), *vacated on other grounds*, 187 Ariz. 27, 926 P.2d 494 (1996). The evidence was particularly probative in the present case where the victim voluntarily approached the car and was talking with Appellant; given Appellant's noticed defenses, the State could reasonably anticipate that Appellant might claim that the victim's purse accidently caught on the car as Appellant drove off, thereby resulting in an accidental death. Although it appears that, at trial, Appellant abandoned his mere presence and accident defenses in favor of his third party culpability defense, the State could not safely anticipate this prior to trial.[2] Moreover, even if a defendant elects at trial not to contest certain issues "the 'burden to prove every element of the crime is not relieved by a defendant's

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[1] Given the overwhelming evidence establishing Appellant's guilt, it was virtually impossible to predict what defense he might actually settle on at trial—he clearly kept his options open. That he would eventually decide to defend by claiming that the real culprit was an initial suspect who had been cleared by the police (Aguilera) was an act of desperation and difficult to predict.

[2] In fact, Appellant did not even notice a third party culpability defense. (See R.O.A., Item 25.)

tactical decision not to contest an essential element of the offense.'" *State v. Dickens*, 187 Ariz. 1, 18, 926 P.2d 468, 485 (1996) (quoting *Estelle v. McGuire*, 502 U.S. 62, 69 (1991)).

Moreover, the other act evidence was also admissible to prove Appellant's intent and motive in grabbing Kyleigh's purse and speeding off with it. Again, Appellant expressly noticed both "Lack of Specific Intent" and "No Criminal Intent" and *never* withdrew those defenses. (R.O.A., Item 25.) Thus, the State was required to prove that Appellant intended to rob Kyleigh of her purse and the other act certainly proved Appellant's motive and intent. *See State v. Villalobos*, 225 Ariz. 74, 80, ¶ 19, 235 P.3d 227, 233 (2010); *Lee*, 189 Ariz. at 599, 944 P.2d at 1213.

Appellant's reliance upon the supreme court's decision in *State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996) is woefully misplaced. In *Ives*, the supreme court--in addressing a *severance* issue—found that the error in denying the motion to sever was not harmless because the evidence would not be cross-admissible under Rule 404(b) at separate trials. 187 Ariz. at 109–11, 927 P.2d at 769–71. Regarding the State's assertion that the evidence was cross-admissible to prove that the acts of child molestation were not merely an accidental or mistaken "touching," the court noted, "There is simply no issue *in this case* as to whether defendant 'accidentally' or 'mistakenly' rubbed the victim's private parts." *Id.* at 111, 927 P.2d at 771

(emphasis added). However, in *this case*, Appellant expressly put the defenses of accident (and mere presence) in issue, requiring the State to rebut those noticed defenses. (R.O.A., Item 25; R.T. 5/4/12, at 20.) And, with regard to the element of intent, the supreme court noted that where a defendant does "not put intent at issue," other act evidence should not be admitted to prove the element of intent. *Ives*, 187 Ariz. at 110, 927 P.2d at 770. However, the court noted that other act evidence was admissible to prove intent if there was "some discernible issue at to the defendant's intent." *Id.* Here, of course, Appellant expressly noticed lack of "specific" and "criminal" intent and *never* withdrew those defenses, even when the prosecutor stated that he was seeking to admit the prior act evidence in direct response to the noticed defenses. Therefore, *Ives* is simply inapplicable to those facts and circumstances of this case.

Finally, the other act evidence was also admissible to prove Appellant's identity as the robber (purse snatcher) in this case. Despite the fact that every occupant of his car positively identified Appellant as the driver and perpetrator, Appellant claimed that he was not the perpetrator, but that Aguilera was the true culprit. (R.T. 10/4/12, Opening Statements, at 18; R.T. 10/18/12, at 78–79, 90–91, 106–09, 112–22.) Thus, Appellant squarely put his identity at issue.

Under Rule 404(b) evidence of other acts are admissible to prove identity through *modus operandi* if the trial court finds that "the pattern and characteristics

of the crimes . . . are so unusual as to be like a signature." *State v. Prion*, 203 Ariz. 157, 163, ¶ 38, 52 P.3d 189, 195 (2002) (quoting *State v. Stuard*, 176 Ariz. 589, 597, 863 P.2d 881, 889 (1993)). In evaluating other act evidence under the *modus operandi* identity ground for admissibility, a trial court examines the similarities and differences between the acts. *See Stuard*, 176 Ariz. at 597, 863 P.2d at 889; *State v. Williams*, 209 Ariz. 228, 233, ¶ 19, 99 P.3d 43, 48 (App. 2004). However, "[a]cts need not be perfectly similar for evidence of them to be admitted under Rule 404." *State v. Lehr*, 227 Ariz. 140, 147, ¶ 19, 254 P.3d 379, 386 (2011). Indeed, "not only is identity in every detail not required, it is not expected." *Williams*, 209 Ariz. at 233, ¶ 20, 99P.3d at 48.

In the present case, the similarities are striking, and the differences, insignificant. The fact that both robberies—"purse snatchings"—were committed from a vehicle is itself quite unusual and distinctive. Second, the same car—Appellant's rented Dodge Charger—was used in both instances. Third, Michael Lopez was present in both instances. Fourth, both robberies were committed in the early morning hours and within 22 hours of each other. Fifth, the female victims were lured to the car by males inside the car (including Appellant and Lopez) making comments regarding their attractiveness. Sixth, in both instances the robber remained inside the car and grabbed the victim's purse. Seventh, in both

instances Appellant sped off immediately after the purse was grabbed, dragging the victim as she held her purse.

The only differences of note is that there were additional occupants inside the car during the robbery of Kyleigh, and that Appellant, rather than Lopez, grabbed Tiffany's purse. The second difference is explained by the fact that Kyleigh approached the car on the driver's side, providing Appellant the opportunity to grab her purse. Nevertheless, these differences pale in significance to the striking similarities between the robberies. The trial court acted well within its considerable discretion in determining that the robberies were "sufficiently similar to support an inference that would tend to prove the defendant's identity." (R.T. 5/4/12, at 25.)

For *any* of the above reasons, the trial court did not abuse its discretion in admitting evidence of the prior robbery.

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